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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

CAROLE L. TOEBE, as Trustee, etc.,

Plaintiff and Respondent,

v.

YOLANDA PULIDO-MELLADO BALYK,

Defendant and Appellant.

C067572

(Super. Ct. No. 2315)

Generally, if a person makes a will or creates a revocable trust, then marries, then dies without having modified the will or revocable trust after the marriage, the surviving spouse is entitled to a share of the estate, regardless of the terms of the will or revocable trust. (Prob. Code, § 21610; hereafter, unspecified code citations are to the Probate Code.) One exception to this general rule applies if, before dying, the decedent gave the surviving spouse something and meant that gift to take the place of the surviving spouse's share of the estate. (§ 21611, subd. (b); hereafter § 21611(b).)

In this case, the decedent created a revocable trust, then married, then died without modifying the revocable trust to provide for the surviving spouse. The decedent intended to give the surviving spouse an interest in the decedent's separate property residence, but no transfer was made during the decedent's lifetime.

A superior court commissioner concluded that the decedent "was giving" the surviving spouse an interest in the residence and, therefore, the surviving spouse was not entitled to a share of the estate under section 21610. We reverse. Evidence of the decedent's uneffectuated intent to give the surviving spouse an interest in the residence did not invoke the section 21611(b) exception to the general rule that the surviving spouse is entitled to a share of the estate.

STATUTORY CONTEXT

Section 21610 allows an omitted spouse to share in the decedent's estate:

"Except as provided in Section 21611, if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the omitted spouse shall receive a share in the decedent's estate, consisting of the following property in said estate:

"(a) The one-half of the community property that belongs to the decedent under Section 100.

"(b) The one-half of the quasi-community property that belongs to the decedent under Section 101.

"(c) A share of the separate property of the decedent equal in value to that which the spouse would have received if the decedent had died without having executed a testamentary instrument, but in no event is the share to be more than one-half the value of the separate property in the estate." (§ 21610, italics added.)

Section 21611 prevents an omitted spouse from sharing in the decedent's estate in three situations (the second of which is applicable to this case):

"The spouse shall not receive a share of the estate under Section 21610 if any of the following is established:

"(a) The decedent's failure to provide for the spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.

"(b) *The decedent provided for the spouse by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.*

"(c) The spouse made a valid agreement waiving the right to share in the decedent's estate." (§ 21611, italics added; see also *Estate of Dito* (2011) 198 Cal.App.4th 791, 801-802 [omitted spouse entitled to share of estate if no exception applies].)

BACKGROUND

In 1998, the decedent, Timothy Balyk, and his first wife, Marda Balyk, amended a previously created revocable trust, the

Balyk Family Living Trust. Timothy and Marda transferred to the trust their assets, including their Castro Valley residence, a San Lorenzo apartment complex, and an annuity. The beneficiaries of the trust were their children: Carole Toebe (trustee and plaintiff), Glenn Balyk, and Jo Ann Lemas. Timothy also executed a will in 1998, giving his remaining assets to the trust.

Marda passed away in 1999, and Timothy married Yolanda Pulido-Mellado (defendant) in 2003.

Timothy died in June 2009, after six years of marriage to Yolanda. After he married Yolanda, Timothy made no changes to the revocable trust, which was last amended in 1998, or to the will. The value of property contained in the trust, plus Timothy's separate property assets not transferred to the trust before his death, is more than \$1.1 million. The most valuable assets were Timothy's Castro Valley residence, a San Lorenzo apartment complex, and an annuity from Aviva.

At the time of Timothy's death, he and Yolanda had \$547.53 in joint tenancy bank accounts. Yolanda received a one-time \$2,400 death benefit from Timothy's union. And she receives \$1,500 monthly in Social Security survivor benefits.

Before he died, Timothy told Yolanda that he intended to provide for her. Yolanda testified that Timothy told her she could continue to live in the Castro Valley residence. Timothy also told her that the Castro Valley residence would go to her and Timothy's son Glenn and that the San Lorenzo apartment complex would go to his daughters, Carole and Jo Ann. Carole

testified that Timothy told her Yolanda could stay in the residence with Glenn's permission.

Carole filed a petition to determine Yolanda's rights under the trust and will. She alleged that the marriage of Timothy and Yolanda was a sham and that no property should pass to Yolanda as an omitted spouse. Yolanda objected to the petition, claiming that she is entitled to a portion of the estate under section 21610.

The matter was tried before a superior court commissioner. The commissioner ruled that the marriage was not a sham and that Yolanda was an omitted spouse. Concerning the property of the estate, the commissioner found that the section 21611(b) exception applied, preventing Yolanda from receiving a share of Timothy's estate under section 21610. The commissioner stated: "Timothy has in fact provided for Yolanda by his comments to her that he wanted her to share the house with Glen[n]. The court finds that he was giving her a one-half life estate in the residence." The commissioner valued this "one-half life estate" at \$85,754.

DISCUSSION

On appeal, Yolanda contends that the commissioner erred by concluding that section 21611(b) applies in this case because (1) Timothy did not "provide[] for [her] by transfer" and (2) the one-half life estate awarded to Yolanda is not "outside of the estate passing by the decedent's testamentary instruments." We need not discuss the second contention because

the first is dispositive; Timothy did not provide for Yolanda by transfer.

Section 21611(b) applies when "[t]he decedent provided for the spouse by transfer" The plain language of this provision requires the decedent to actually transfer property. It does not apply when the decedent meant to, or intended to, transfer property, but did not. Here, it cannot be disputed that Timothy did not transfer a one-half life estate in the Castro Valley residence to Yolanda. He talked about it, but he never did it. Therefore, the commissioner erred by concluding that section 21611(b) applied.

It appears the commissioner may have been confused by the intent language found later in section 21611(b). That language requires that, to apply section 21611(b), there must be evidence that the decedent intended the transfer to take the place of the omitted spouse's share in the estate: "[T]he intention that the transfer be in lieu of a provision in said instruments [must be] shown by statements of the decedent or from the amount of the transfer or by other evidence." (§ 21611(b).)

Assuming, without deciding, that there was enough evidence to establish that Timothy intended the transfer of an interest in the residence to take the place of Yolanda's right to share in the estate, that intent is irrelevant because Timothy never made the transfer. Viewing the evidence in the light most favorable to the order, the evidence was insufficient to sustain the order because of the absence of evidence of a transfer of

the interest in the residence. (See *Estate of Leslie* (1984) 37 Cal.3d 186, 201 [sufficiency of evidence standard].)

Carole attempts to defend the commissioner's decision by (1) noting that Yolanda also received the one-time \$2,400 union death benefit and monthly Social Security survivor benefits and (2) arguing that the evidence of Timothy's intent was uncontradicted. Neither point supports the order. First, while there was evidence of the union death benefit and Social Security survivor's benefits, there was no evidence that Timothy knew of those benefits, let alone intended to "transfer" those benefits to Yolanda in lieu of a share of his estate. And second, no amount of intent on Timothy's part makes up for the fact that he did not transfer a property interest in the residence to Yolanda.

Yolanda asks this court to reverse the commissioner's order and grant her the relief she sought "in its entirety." While we hold that section 21611(b) does not apply here and we therefore reverse the order, granting all the relief Yolanda seeks is beyond the scope of this appeal. We therefore remand for further proceedings, applying section 21610.

DISPOSITION

The order is reversed, and the cause is remanded for further proceedings consistent with this opinion. Yolanda is

awarded her costs on appeal. (Cal. Rules of Court, rule
8.278(a)(1).)

NICHOLSON, Acting P. J.

We concur:

HULL, J.

MAURO, J.